Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1736

WILLIAM GODFREY MIGELY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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In the
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WILLIAM GODFREY MIGELY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on April 18, 1979.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit has not been officially reported. The court's opinion is set forth in the Appendix, *infra*.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on April 18, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Question Presented.

Whether Rule 41(e) of the Federal Rules of Criminal Procedure requires an evidentiary hearing on a motion to suppress where the defendant has shown a reasonable basis for the conclusion that evidence in the Government's possession derived from an unlawful mail cover or an unlawful search.

Statutes and Regulations Involved.

This case involves an interpretation of Rule 41(e) and the precepts of the Fourth Amendment to the United States Constitution.

Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rules of Criminal Procedure, Rule 41.

. . . . . .

> **(e) Motion for return of property.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

. . . . . .

Statement of the Case.

The grand jury for the District of Massachusetts returned a one-count indictment against petitioner William Godfrey Migely charging a violation of 18 U.S.C. § 1542 (false statement in passport application). After pre-trial discovery and suppression motions, a court trial on stipulated facts was held before the Honorable A. David Mazzone, United States District Judge, District of Massachusetts. After accepting the stipulation, the court found the petitioner guilty and sentenced him to one year in the custody of the Attorney General with the imposition of the sentence suspended and the petitioner placed on probation for three years.

Counsel filed certain motions for discovery, for further discovery, and to suppress, attaching thereto affidavits of

counsel and exhibits which alleged the following: On February 13, 1978, Migely appeared in the Passport Office in Boston and applied for a passport in the name of David Joseph Natta. He presented a birth certificate and an Oregon driver's license in that name. On the very next day, when he returned to pick up the passport, he was arrested, and, in the course of the post-arrest interrogation, was questioned repeatedly about one Dennis Kelly. The speed of the petitioner's apprehension and the substance of the post-arrest inquiry raised substantial questions. The documents alleged that the arresting officers had gleaned certain information from a computer, and that that information had long predated Migely's application for a passport on February 13, 1978. Counsel alleged further that in 1974 the Federal Bureau of Investigation and the Drug Enforcement Administration had been investigating Dennis Kelly for possible passport violations involving the use of birth certificates of deceased infants, and for violations of the drug enforcement laws. Petitioner Migely had been referred to in various reports regarding the Kelly investigation, with his residence itself being the object of surveillance. During the course of the Kelly investigation, the F.B.I. and the D.E.A. had conducted a warrantless and illegal search of a warehouse rented by Kelly. The Department of Vital Statistics in Portland, Oregon, sent, on request, the birth certificate of David Joseph Natta to Migely's home on December 11, 1975. Within a matter of days after the certificate was sent, on December 15, 1975, the Government received a copy of Natta's death certificate from the Department of Vital Statistics. Petitioner alleged that the timing of the Government's receipt of the Natta death certificate, coupled with the ongoing investigation of Dennis Kelly and the existence of at least one unlawful search, strongly suggested that his residence was also the subject of an

unlawful search of the premises, or an unlawful mail cover.* The Government replied that there had been "no interception of the mail or examination of letters in connection with this case," which response was ruled adequate by a federal magistrate. During a subsequent hearing before the judge, the Assistant United States Attorney represented that "there were no surreptitious entries about which the defendant has any standing to complain." The petitioner then asked for an evidentiary hearing, with a view toward examining the agents involved and establishing whether searches or mail covers had in fact occurred. The court denied that request.

The Reasons for Granting the Writ.

This case presents important issues of federal jurisdiction and procedure, concerning the administration of criminal justice in the federal courts, and in particular Rule 41(e) of the Federal Rules of Criminal Procedure.

The question is what threshold showing must a defendant make to entitle him to an evidentiary hearing on any disputed factual matters. To date, no federal circuit court has chosen to enumerate all the specific factors which a District Court judge must consider in deciding whether a hearing upon a suppression motion is required. As a result, the situation is confusing, and, in some sense, arbitrary. The majority of federal circuits apparently have adopted the guidelines set forth in *Cohen* v. *United States*, 378 F. 2d 751, 761 (9th Cir. 1967),

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* The term "mail cover" means the covert examination of the outside of a piece of mail in transit, which, unless properly authorized, would constitute a Fourth Amendment violation. *United States* v. *Choate*, 422 F. Supp. 261 (C.D. Cal. 1976), *rev'd*, 576 F. 2d 165 (9th Cir. 1978). *See* 39 C.F.R. § 233.2(c)(1).

cert. den. 389 U.S. 897 (1967), which requirements are vague at best: "whether the allegations of the moving papers, including affidavits if any are filed, are sufficiently definite, specific, detailed, and non-conjectural, to enable the court to conclude that a substantial claim is presented. If the allegations are sufficient, and factual issues are raised, a hearing is required."

Outside of precedents under Rule 41(e), guidance is provided in situations where electronic surveillance has been claimed (under 18 U.S.C. § 3504). But while that law has grown quite specific with regard to the kind of showing required by defendants, and the adequacy of various responses by prosecutors, *United States* v. *Alter*, 482 F. 2d 1016 (9th Cir. 1973), it remains for this Court to suggest that that precedent is applicable in cases like the instant one.

The Court of Appeals decision wholly failed to answer the question of the appropriate standard to be used in cases of this sort.

Conclusion.

For the reasons set forth above, the Court should grant this petition for certiorari.

Respectfully submitted,

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Appendix.

United States Court of Appeals
For the First Circuit

No. 78-1434

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM GODFREY MIGELY,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Aldrich and Campbell, *Circuit Judges*,
and Gignoux, *District Judge*.*

Nancy Gertner, with whom *Silverglate, Gertner & Shapiro*, *Marcus S. Topel* and *Paul D. Wolf*, were on brief, for appellant.
Robert B. Collings, First Assistant United States Attorney, Chief, Criminal Division, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

April 18, 1979

Campbell, *Circuit Judge*. On February 13, 1978, William Godfrey Migely applied in Boston for a passport in the name of David Joseph Natta, a deceased infant, presenting a birth certificate and an Oregon driver's license. He was arrested when he returned and signed for the passport the following day, and was convicted of making a false statement in a passport application, 18 U.S.C. § 1542, after a court trial on stipulated facts.

* Sitting by designation.

Prior to trial, Migely unsuccessfully moved to suppress all evidence relating to use of the name David Joseph Natta. This motion was accompanied by claims that Migely's arrest had resulted from an illegal, warrantless search of his residence or mail, or else from the illegal inspection of the cover of a letter — i.e., a "mail cover"[1] — addressed to his home in Portland, Oregon. In connection with his motion to suppress Migely filed a motion for discovery of the occurrence of any searches made by means of mail covers or otherwise of mail sent to his home in Portland. The discovery request was granted, but the government's response, that there had been

> "no interception of mail or examination of letters placed in the mail either to or from residences owned or occupied by the defendant in connection with the investigation of the charge contained in the instant indictment,"

was ruled adequate by a federal magistrate. Migely still insisted that an illegal mail cover had occurred, however. He made a motion for further discovery, asking for information concerning any mail covers of mail delivered to his home in Portland, including covers instituted in connection with two West Coast passport fraud and drug violation cases involving him and one Dennis Kelly. This motion was denied at a motions hearing. During the hearing, the Assistant United States Attorney represented that no mail covers had occurred, and that this answer included "all of the investigation that was conducted, and whatever was done by the Government in connection with this Kelly case that has gone on on the West Coast." The

[1] Defendant uses the term "mail cover" as meaning covert examination of the outside of a piece of mail in transit. *See* 39 C.F.R. § 233.2(c)(1). Such activity is claimed to constitute a fourth amendment violation. *See United States* v. *Choate*, 422 F. Supp. 261 (C.D. Cal. 1976), *rev'd*, 576 F.2d 165 (9th Cir. 1978). We need not consider to what extent, if any, this may be so.

prosecutor said that he had discussed the question with the agents involved, that, "No mail covers, searches were made," and that, "There were no surreptitious entries about which the Defendant has any standing to complain."

Migely then asked for an evidentiary hearing, with a view toward examining the agents involved and establishing that mail covers or searches in fact had occurred. The trial court denied this request, as well as the motions for further discovery and to suppress, indicating that it felt that Migely was on a fishing expedition.

Migely appeals on the ground that, "The district court erred in denying defendant's motion for an evidentiary hearing on his motion to suppress made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure." Although it is not clear that Migley's motion was in fact under Rule 41(e),[2] both parties point to cases decided under that rule as setting forth a standard for determining when a defendant is entitled to an evidentiary hearing, and we agree that the same standard would in any event be applicable here.

Evidentiary hearings on motions under Fed. R. Crim. P. 41(e) are not granted as a matter of course; they are required only when a defendant makes a sufficient showing that a warrantless search has occurred. The defendant must allege facts, "sufficiently definite, specific, detailed, and non-conjectural, to enable the court to conclude that a substantial claim is presented." *Cohen* v. *United States*, 378 F.2d 751, 761 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967). The factual allegations must be such that, if proved, would require the grant of relief, *Grant* v. *United States*, 282 F.2d 165, 170 (1960), and must be more than "general and conclusory or based upon suspicion and

[2] Neither of Migely's motions to suppress referred specifically to Rule 41(e) — as opposed to Rule 41 as a whole — or requested the return of any property.

conjecture." *Cohen*, 378 F.2d at 760; *accord*, *United States* v. *Poe*, 462 F.2d 195, 197 (5th Cir. 1972), *cert. denied*, 414 U.S. 845 (1973); *United States* v. *Thornton*, 454 F.2d 957, 967 n.65 (D.C. Cir. 1971); *United States* v. *Cranson*, 453 F.2d 123, 126-27 (4th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972); *cf. Lawn* v. *United States*, 355 U.S. 339, 348-49 (1958) (mere suspicions create no due process right to hearing on evidence presented to Grand Jury).

Migely's showing clearly falls short of meeting these standards. The allegations made in Migely's affidavits in support of his motion to discover and to suppress can be fairly summarized as follows: The FBI and the Drug Enforcement Administration had been investigating Dennis Kelly for possible passport violations involving the use of birth certificates of deceased infants. They had observed that Kelly was spending considerable time — and perhaps residing — at Migely's house in Portland, Oregon, and had kept the house under surveillance. In the spring of 1975 they had conducted a warrantless search of a warehouse rented by Kelly. That December, the Department of Vital Statistics in Portland sent, on request, the birth certificate of David Joseph Natta to Migely's house, which had a "flip-top" mail box. Within several days after the certificate was sent the government received a copy of Natta's death certificate from the Department of Vital Statistics. When Migely applied for the passport in Boston over two years later, a computer check was run and led to his arrest. The government's questioning of Migely immediately thereafter focused on the West Coast investigation of Kelly.

Migely asks us to infer from these facts that a mail search violating his fourth amendment rights must have occurred. But these facts are insufficient to create such an inference. The government could have learned that the Natta birth certificate had been sent to Migely's address in

any number of conceivable legal ways, as well as through the methods hypothesized by Migely. (For example, an informer may have been involved.) Migely's theory of an unlawful search is no more than conjecture and speculation. Given the government's denial, an evidentiary hearing was not required. *See Cohen*, 378 F.2d at 760.

Migely urges that the government's denial was evasive and inadequate, and that it supported rather than precluded the need for an evidentiary hearing. He points out that the government limited its initial response to searches "in connection with . . . the instant indictment," and its response at the motions hearing to "entries about which the Defendant has standing to complain." Further, he objects to the district court's reliance on the prosecutor's oral representation that the government's response encompassed the West Coast investigation as well. Drawing an analogy to the standards used by some courts when electronic surveillance is alleged under 18 U.S.C. § 3504, Migely argues that he is entitled to an evidentiary hearing because the government did not "squarely affirm or deny" his charges by affidavit. *See United States* v. *Vielguth*, 502 F.2d 1257, 1260 (9th Cir. 1974) (per curiam); *Korman* v. *United States*, 486 F.2d 926, 930-31 (7th Cir. 1973); *United States* v. *Alter*, 482 F.2d 1016, 1024-27 (9th Cir. 1973).

We do not agree that the government's response either raised or left open the possibility that a search or a mail cover had occurred. The government's written response, although limited to the "instant indictment," was broad enough to negate the possibility that the FBI had discovered that the Natta birth certificate was sent to Migely's home through an illegal search. Nor do we find the Assistant U.S. Attorney's reference to searches "about which Migely had standing to complain" objectionable. There had been a warrantless search of a warehouse rented

by Kelly in the course of the West Coast investigation, and the Assistant United States Attorney stated during oral argument before this court that it was because of this event that he qualified his response. The government was adequately responsive to Migely's vague assertions that the elusive illegal search might have occurred in connection with the broader West Coast investigation; moreover, we see no reason to penalize it now because it did not respond in the form of an affidavit. Migely did not make a focused request that the government file an affidavit, nor did he maintain an objection based on the court's failure to require one. While the court could have imposed such a requirement as an exercise of its discretion, Migely's showing was not such that it abused its discretion by not doing so.[3]

Affirmed.

[3] Migely overstates the extent of his legal right to insist that the government should have responded here in precisely the manner required when an aggrieved party makes a claim of electronic surveillance. The government's duty to "affirm or deny" the occurrence of electronic surveillance arises from a specific statute directed to that type of activity. 18 U.S.C. § 3504. A district court may doubtless, in its sound discretion, impose a similar duty to respond where a defendant makes a sufficiently credible claim of other governmental intrusions violative of the fourth amendment. As there is no statute, however, the court has greater latitude in determining when and how to proceed and what form of response to accept. Here the government made a denial of the illegal activities alleged, and we cannot say the district court abused its discretion in deeming the response sufficient both in form and in substance.